

COPY



STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

April 25, 2008

RECEIVED
APR 28 2008
Department of Water Resources
Eastern Region

Mr. Robert L. Harris
Holden Kidwell Hahn & Crapo
1000 Riverwalk Drive, Suite 200
PO Box 50130
Idaho Falls, ID 83405

Re: Letter Dated April 1, 2008 Regarding Alleged Waste of Water and Trespass on
Property Owned by Larry Phillips.

Dear Mr. Harris:

The purpose of this letter is to acknowledge receipt of, and respond to, the letter dated April 1, 2008, regarding the alleged waste of water by the Idaho Department of Fish and Game (hereinafter the "IDF&G") at the Sterling Wildlife Management Area (hereinafter "Sterling WMA"), and trespass on property owned by Larry Phillips in Bingham County. After I received your letter, I asked the IDF&G to investigate the matter and provide me the necessary information to respond to your letter. I found that your letter omitted some important facts that I will explain:

Water right no. 35-8624 authorizes the diversion of ground water for wildlife purposes. The water from the well is discharged into Johnson Pond, and an outlet structure at the southeast corner of Johnson Pond controls its water level. After the water is discharged from Johnson Pond, the released water flows across wetlands on the Sterling WMA and sinks. The original application for water right no. 35-8624 requested the amount of 4 c.f.s. for diversion. When the Idaho Department of Water Resources (hereinafter the "IDWR") conducted its licensing examination in 1991, the IDWR measured the output of the original pump to be 1.01 c.f.s., and the IDWR issued a license for water right no. 35-8624 in that amount. The total amount authorized for diversion in a year was calculated on the assumption that the pump diverted water for 24 hours a day for the entire 365 days in a year. The IDF&G has rebuilt the original pump after the licensing examination, although the pump has not been altered in any way to increase its capacity. The IDWR measured at the request of the IDF&G the capacity of this pump on April 23, 2008. The measurement was just under one cubic foot per second, which is less than the authorized diversion rate of 1.01 c.f.s. Thus, the facts do not support Mr. Phillips' claim that the IDF&G is diverting water in excess of water right no. 35-8624.

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Mr. Phillips real property is adjacent to and north of Johnson Pond. A county road divides the two properties, and two culverts connect Johnson Pond to a low area on the southern end of Mr. Phillips' real property. The normal drainage is from Mr. Phillips property through the culverts and into Johnson Pond. The IDF&G determined that obstructions in the outlet structure of Johnson Pond caused the water level in Johnson Pond to be higher than the IDF&G normally maintains Johnson Pond. The well for water right no. 35-8624 was turned off, and the outlet structure was cleared. I understand that the IDF&G turned on the well on April 23, 2008. The IDF&G believes that these actions will assure that Johnson Pond is maintained at normal operating water elevations.

The IDF&G did observe a small pond of water about twenty feet in diameter on Mr. Phillips's property on March 31, 2008 during a routine inspection of the area. While the IDF&G has not determined the cause of this small pond, which is now gone, the IDF&G understands that a potential exists for Johnson Pond to back water up onto Mr. Phillips property. Again, the actions described above should assure that this problem does not occur.

The IDF&G has advised me of a couple of issues that need some attention by Mr. Phillips. First, Mr. Phillips has attached a hose to the existing well for water right no. 35-8624. The hose takes water pumped by the IDF&G through the existing culverts and discharges into a horse watering trough. Enclosed is correspondence that documents this use by Mr. Phillips. Although IDF&G has reluctantly allowed Mr. Phillips to use this water in this manner, I have advised the IDF&G that this use should terminate, since water right no. 35-8624 does not authorize stock watering. Please advise Mr. Phillips that the IDF&G will take all appropriate legal actions to preclude Mr. Phillips illegal use of this water in the future.

Second, Mr. Phillips has allowed his irrigation return water on his property to flow through the culverts into Johnson Pond. When this has happened, he has demanded that IDF&G compensate him for this water by release of water from its allotment from Aberdeen-Springfield Canal Company. Enclosed is correspondence that documents this past practice. Please be advised that the IDF&G has no obligation to continue this practice and will not do so.

Finally, I wanted to briefly address the issue you raised about West Nile virus. The IDF&G has cooperated fully with Bingham County regarding control measures for the mosquito vector that transmits this disease and will continue to do so. These measures have included and will include release of fish into Johnson Pond that prey upon mosquito larvae.

Sincerely,



DAVID J. BARBER

Deputy Attorney General

DJB/ov

Encl.

cc with enclosures:

David R. Tuthill

Lyle Swank



IDAHO FISH & GAME
SOUTHEAST REGION
1345 Barton Road
Pocatello, Idaho 83204-1819

June 17, 1998

Philip E. Batt / Governor
Stephen P. Mesley / Director

Mr. Larry Phillips
1524 S. 2600 W.
Aberdeen, ID 83210

Dear Larry,

We were contacted by the Aberdeen-Springfield canal company about transferring some of our water shares to make up for the water that you over-utilized last year. We have completed the transfer and are glad to help you out this time. We just want to clarify our position in the unlikely event that last year's situation arises again. Please be aware that we will not be doing this again except for extreme circumstances. We are certainly willing to accept your overflow water if you want or need to spill it; there is no doubt that the extra water benefits wildlife. However, we do not feel obligated to you for this water and will not be transferring our water shares to you in payment for the water. If you would prefer to not send it through the Johnson Pond, that would be fine also. We seem to have a pretty good arrangement worked out during usual irrigation years and are happy to continue, given the above condition.

Thanks for your time.

Sincerely,

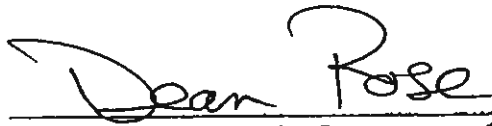
Dean Rose
Regional Habitat Biologist

cc: Aberdeen Springfield Canal Company

From: ABCC

2083974510

05-04-98 10:12 P. 002

Date: May 5, 1998To: Aberdeen-Springfield Canal Company
Aberdeen, IdahoFor the irrigation season 19 97.Please transfer 2485 inches worth of irrigation water credited to Idaho Department of Fish &
Game, to be used by Larry Phillips at the following location: Headgate number U-1-6

Representative for Idaho Department of Fish & Game

From: ABCC

2083974510

05-04-98 10:12 P. 001

ABERDEEN-SPRINGFIELD CANAL COMPANY

144 South Main Street
P.O. Box "Y"
Aberdeen, Idaho 83210
Tel. (208) 397-4192

May 4, 1998

Paul Wackenhut
Idaho Department of Fish & Game
Fax#: 233-6430

Dear Paul,

Following this letter is a temporary transfer form. I have taken the liberty of filling in the information needed. You may fax this form back to us after signing same (Fax# 397-4510).

I just finished talking to Ray Duffin, President of the Board of Directors, and he feels that it would be acceptable to accept a transfer from Fish & Game for this past year this time. I told him that I would write Larry Phillips a letter and strongly ask him, in the future, to take care of this type of situation prior to the deadline that we establish for transfers.

As I indicated to you on the phone, if you wish to have an on-going agreement with Larry Phillips where he draws water and Fish & Game covers the use, we will need a copy of an agreement between Larry and Fish & Game in order to honor this in the future.

If you have further questions, please don't hesitate to call.

Sincerely,


Pam A. Mulbrook